

These are the tentative rulings for civil law and motion matters set for Tuesday, July 31, 2012, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday, July 30, 2012. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY THE HONORABLE CHARLES D. WACHOB AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 42, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0052035 Golden 1 Credit Union vs. Siminski, Joseph C., et al

Plaintiff's Motion to Deem Admitted all Requests for Admission, Set One is denied for lack of proper service. This matter was initially set for hearing on July 10, 2012, but continued at the time of the hearing to July 31, 2012 at 8:30 a.m. in Department 40. Plaintiff's counsel was directed to send notice of the continuance to defendant Bonnie Siminiski, but there is no notice of the continued hearing in the court's file.

2. M-CV-0055047 Cavalry SPV I, LLC vs. Melnik, Stepan V.

The Demurrer to the Complaint was continued to August 28, 2012 at 8:30 a.m. in Department 40.

3. S-CV-0027709 Fluken, Linda A., et al vs. Parkland Homes, Inc.

The unopposed motion by Paul A. Herp, Law Office of Beverly E. Narayan to be relived as counsel for cross-defendant Howard Construction Fencing & Fabrication, Inc. is granted, effective upon service of the order on the cross-defendant and all parties who have appeared in the action.

4. S-CV-0028073 Stanfield, James Lynn, et al vs. Masumbuko, Andre, et al

Plaintiff's unopposed Motion for Order Compelling Responses to Request for Admissions (Set One) is denied. Plaintiff has not sought an order deeming requests admitted. There is no provision in the Code of Civil Procedure for a motion to compel responses (as opposed to *further* responses) to requests for admission.

Plaintiff's unopposed Motion for Order Compelling Responses to Special Interrogatories (Set Two), Form Interrogatories (Set Two), and Request for Production of Documents (Set Two)

is granted. Defendant must serve full and complete verified responses, without objections, on or before August 21, 2012.

Sanctions are denied on the Motion for Order Compelling Responses to Form Interrogatories, Special Interrogatories, and Request for Production of Documents because the motions were not opposed. Code Civ. Proc. §§ 2030.290(c), 2031.300(c). The court declines to award sanctions pursuant to California Rules of Court, Rule 3.1348(a), as the statutes governing this discovery authorize sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. (*Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.) Further failure to comply with discovery obligations may lead the court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481.)

5. S-CV-0029099 Pratt, William vs. Thompson, Ray S., et al

Defendant's Motion to Compel Answers to Special Interrogatories, Set Three is granted. Although plaintiff filed a late "opposition" on July 27, 2012, indicating that he had served full and complete responses to the discovery at issue on July 26, 2012, plaintiff admits that the responses are currently unverified. Unverified responses are tantamount to no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.) Plaintiff is ordered to serve full and complete verified responses, without objections, by no later than August 21, 2012.

Defendant's Motion to Compel Release of Medical Records is denied without prejudice. Defendant failed to serve the motion on deponent VA Sierra Nevada Health Care, the third party upon whom the subpoena at issue was served, and against whom defendant seeks an order compelling production. Further, defendant fails to establish that the subpoena was validly served in compliance with Code of Civil Procedure section 1985.3(b)(3). To the extent defendant asks the court to compel plaintiff to execute an authorization releasing his medical records, defendant fails to provide any authority to support this request.

Defendant's alternative request for a judge's signature of subpoena is denied. The deponent's response to the deposition subpoena indicates that the Requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule 45 CFR Parts 160 and 164 must be met before a patient's private medical records may be released. Despite deponent's representation that a subpoena signed by a judge may satisfy its requirements for the purpose of release of a patient's medical records, there is no support such a conclusion based on a party's ability to obtain a court-issued subpoena pursuant to Code of Civil Procedure section 2020.210. Nor has defendant made any such showing.

Defendant's request for sanctions is denied as the notice of motion fails to identify the person, party or attorney against whom sanctions are sought. (*Code Civ. Proc.* § 2023.040; *Local Rule 20.2.4(E).*)

6. S-CV-0029579 McCrory, Charles T., et al. vs. Wilmington Trust Co., et al

This tentative ruling is issued by the Honorable Colleen M. Nichols. If oral argument is requested, it shall be heard on July 31, 2012 at 9:00 a.m. in Department 1. Department 1 is located at 101 Maple Street, Auburn, CA 95603. Defendants Wells Fargo Bank, N.A. and Wilmington Trust Company's Motion to Set Aside Entry of Default is granted. Defendants must

file and serve any response to the complaint by no later than August 14, 2012. If oral argument is requested, defendants' request for telephonic appearance is granted. The court will contact counsel when the matter is called for hearing.

7. S-CV-0029989 Stark, Susan vs. Lewis, Vicki, et al

The Motion for Terminating Sanctions was dropped.

8. S-CV-0030009 Kelly, Melissa vs. John's Incredible Pizza Co., Inc., et al

Defendants' Motion to Compel Responses to Form Interrogatories-Employment Law is granted. Plaintiff must serve full and complete, verified responses by no later than August 21, 2012. Sanctions are denied because the motion was not opposed. (*Code Civ. Proc. § 2030.290(c)*.) The court declines to award sanctions pursuant to California Rules of Court, Rule 3.1348(a), as the statutes governing this discovery authorize sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. (*Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc. (1997) 60 Cal.App.4th 352, 355.*) Repeated failure to comply with discovery obligations may lead the court to find an abuse of the discovery process and award sanctions on that basis. (*Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal.App.3d 481.*)

9. S-CV-0030291 Hay, Brenda vs. El Dorado County Office Education, et al

The Demurrers to the Third Amended Complaint and Motion to Strike are continued to August 16, 2012 at 8:30 a.m. in Department 42 to be heard by the Honorable Charles D. Wachob.

10. S-CV-0030381 Horrocks, Clyde, et al. vs. Recon Trust Company, N.A., et al

This tentative ruling is issued by the Honorable Colleen M. Nichols. If oral argument is requested, it shall be heard on July 31, 2012 at 9:00 a.m. in Department 1. Department 1 is located at 101 Maple Street, Auburn, CA 95603.

Defendants' request for judicial notice is granted. Defendants' Demurrer to the First Amended Complaint ("FAC") is overruled in part, and sustained in part. As to the first cause of action for breach of contract, plaintiffs adequately state a claim against defendant BAC Home Loans Servicing, LP ("BAC") and Bank of America. Plaintiffs allege a validly executed written Loan Modification Agreement ("LMA") entered into with BAC. Plaintiffs also allege that defendant Bank of America demanded and accepted the benefits of the LMA in the form of modified payments. Plaintiffs also allege breach of the LMA in that both BAC and Bank of America failed and refused to honor the terms of the LMA, despite plaintiffs' full performance of their obligations thereunder. As against BAC and Bank of America, the demurrer to the first cause of action is overruled.

As against the remaining defendants, the demurrer to the first cause of action is sustained without leave to amend. Plaintiff's allegations of successor liability are insufficient. The mere assignment of rights under a contract does not automatically pass the assignor's personal

liabilities. *Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 745. Whether a successor assumed liability is determined by the intent of the parties as indicated by their acts, the subject matter of the contract, or their words. *Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350. Plaintiffs' conclusory allegations that remaining defendants are subject to liability based on succession by merger is unsupported by fact or legal authority.

The demurrer is sustained without leave to amend as to the second cause of action for declaratory and injunctive relief. As the property has already been sold, plaintiffs fail to allege any actual, present controversy with defendants. To the extent this claim is based on allegations of the other causes of action, it fails because those causes of action fail. The request for injunctive relief is moot because the foreclosure sale of the property has already taken place.

The demurrer is sustained without leave to amend as to the third cause of action for promissory estoppel. Plaintiffs fail to allege promises that are clear and unambiguous on their terms. *Laks v. Coast Fed. Sav. & Loan Ass'n* (1976) 60 Cal.App.3d 885, 890. Where the asserted promises are conditional on their face, the claim for promissory estoppel fails. *Id.* at 891. Plaintiffs also fail to adequately allege detrimental reliance. Any money plaintiffs paid was due under the loan agreements and cannot constitute damages. *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185. Plaintiffs do not allege that they made a substantial change of position based on defendants' representations, or that defendants could reasonably expect a substantial change of position by plaintiffs.

The demurrer is sustained without leave to amend as to the fourth cause of action for negligent misrepresentation. Negligent misrepresentation is a species of fraud and the claim must meet the heightened pleading standard of particularity. *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174. Plaintiffs fail to specifically plead detrimental reliance. "[S]pecific pleading is necessary to 'establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom." *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092.

The demurrer is sustained without leave to amend as to the fifth cause of action for intentional misrepresentation. When pleading fraud against corporate defendants, plaintiffs must specify the identity of the person who made the misrepresentation, his authority to speak on behalf of the corporation, and when and to whom the representation was made. *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157. To the extent the claim is based on concealment, it fails because there is a lack of fiduciary duty between plaintiffs and defendants. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189. Plaintiffs fail to specifically plead detrimental reliance. Any money plaintiffs paid was due under the loan agreements and cannot constitute damages. *Auerbach v. Great Western Bank, supra*, 74 Cal.App.4th at 1185.

The demurrer is sustained without leave to amend as to the sixth cause of action for wrongful foreclosure. Any claim integrated with an allegedly irregular sale must fail unless the trustor can allege and establish a valid tender. *Arnolds Mgmt. Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579. According to documents attached to the FAC, and of which the court may take judicial notice, defendants were entitled to institute foreclosure proceedings. Civ. Code § 2924 *et seq.* Nothing in the applicable California statutes precludes foreclosures by a party lacking possession of the original promissory note. *Debrunner v. Deutsche Bank Nat'l Trust Co.* (2012) 204 Cal.App.4th 433, 440.

The demurrer is sustained without leave to amend as to the seventh cause of action to expunge notice of default. Any claim integrated with an allegedly irregular sale must fail unless the trustor can allege and establish a valid tender. *Arnolds Mgmt. Corp. v. Eischen, supra*, 158 Cal.App.3d at 579. According to documents attached to the FAC, and of which the court may take judicial notice, defendants were entitled to institute foreclosure proceedings. Civ. Code § 2924 *et seq.*

The court presumes that the facts alleged in the FAC state the strongest case for plaintiffs. *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286. Although plaintiffs request leave to amend defective causes of action, they have failed to demonstrate a reasonable possibility that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

Defendants' separate "motion to expunge lis pendens" is denied, as no such relief was requested in the notice of motion. If oral argument is requested, defendants' request for telephonic appearance is granted. The court will contact counsel when the matter is called for hearing.

11. S-CV-0030399 Cederlund, Dawn vs. Rivera, Lidia, et al

Plaintiff's Motion for Appointment of Provisional Directors is denied. Plaintiff moves pursuant to Corporations Code section 308(a) for appointment of provisional directors to the Rivera Sales Corporation. By its plain terms, Corporations Code section 308(a) applies only if "a corporation has an even number of directors who are equally divided." In this case, the parties agree that there is only one current director of the Rivera Sales Corporation, defendant Lidia Rivera. Further, even if Corporations Code section 308(a) was found to apply in this situation, plaintiff fails to establish through admissible evidence that there is a danger that the corporation's property and business will be impaired or lost if provisional directors are not appointed by the court.

Plaintiff's separate request, set forth in its reply papers, that the court disqualify defendant's counsel *sua sponte* is denied. Any such relief must be separately requested through a properly noticed motion.

12. S-CV-0030623 Crisostomo, Grace Soliman vs. Aztec Foreclosure Corp et al

Appearance is required on July 31, 2012 at 8:30 a.m. in Department 42. Defendant Deutsche Bank National Trust Company, as Trustee ("Deutsche") is advised that the court's tentative ruling procedures must be stated in the notice of demurrer. Local Rule 20.2.3(B). Deutsche's request for telephonic appearance is granted. The court will contact counsel when the matter is called for hearing.

Plaintiff's request for a six-week continuance of the hearing on the demurrer is denied. Plaintiff fails to provide any support for her request, including any facts regarding previous or current efforts to locate counsel.

Deutsche's Demurrer to the Complaint is sustained without leave to amend. Plaintiff's third cause of action for negligence fails to state facts sufficient to constitute a valid cause of action against Deutsche. For purposes of this cause of action, plaintiff alleges that she was directed into a loan for which she was not qualified, and that defendants failed to properly maintain and create original documents, failed to make required disclosures, accepted payments

and charged fees to which they were not entitled, and wrongfully authorized reporting to credit bureaus. (*Complt.*, ¶¶ 89-92.) However, plaintiff fails to adequately allege a duty of care owed by Deutsche to plaintiff. The threshold question in a negligence action is whether a duty exists to use due care toward the interest of another. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57.) Plaintiff alleges nothing more than a conventional mortgage loan transaction, and does not identify any duty of care owed by Deutsche to plaintiff. (*See Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1095-1096.)

Plaintiff's sixth cause of action for fraud fails to state facts sufficient to constitute a valid cause of action against Deutsche. When pleading fraud against corporate defendants, plaintiff must specify the identity of the person who made the misrepresentation, his authority to speak on behalf of the corporation, and when and to whom the representation was made. (*Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) Plaintiff's complaint does not specify any acts by Deutsche constituting fraud. Plaintiff fails to specifically plead detrimental reliance. "[S]pecific pleading is necessary to 'establish a complete causal relationship' between the alleged misrepresentations and the harm claimed to have resulted therefrom." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092.)

Plaintiff's seventh cause of action for violations of Business & Professions Code § 17200 fails to state facts sufficient to constitute a valid cause of action against Deutsche. To the extent this claim is based on other claims asserted against Deutsche, it fails because those claims fail. Plaintiff does not establish a specific law or laws violated, or that defendants committed fraud. A UCL claim stands or falls depending on the fate of the antecedent substantive causes of action. (*See Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178.) Plaintiff also fails to establish standing because she does not allege that she has suffered injury in fact and lost money or property as a result of the alleged unfair practices. (*Bus. & Prof. Code* §§ 17204; 17535. *R&B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 360.)

Plaintiff's eighth cause of action for breach of the implied covenant of good faith and fair dealing fails to state facts sufficient to constitute a valid cause of action against Deutsche. Plaintiff fails to allege the existence of a contract between plaintiff and Deutsche. (*Racine & Laramie v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.) The implied covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel* (2000) 24 Cal.4th 317, 349-350 (*cit omit.*))

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint does not suggest on its face that it is somehow capable of amendment and plaintiff has failed to make any showing that the complaint can be amended to change its legal effect. The demurrer is sustained without leave to amend.

13. S-CV-0030685 Forry, Ross vs. Bank of America, N.A., et al

Defendant Bank of America, N.A.'s ("BANA's") request for judicial notice is granted. BANA's Demurrer to the Complaint is sustained without leave to amend. If oral argument is

requested, BANA's request for telephonic appearance is granted. The court will contact counsel when the matter is called for hearing.

Plaintiff's first cause of action for fraud, second cause of action for intentional misrepresentation, and fourth cause of action for violation of Civil Code section 1572 (actual fraud), fail to state facts sufficient to constitute valid causes of action. These claims are based on plaintiff's assertions that defendants lacked authority to initiate foreclosure proceedings. However, based on documents of which the court takes judicial notice, defendant Cal-Western Reconveyance Corporation ("Cal-Western") was authorized as trustee to record a notice of default against the property on May 22, 2008. These claims are barred by the applicable statute of limitations, as they purportedly address claims of fraud occurring in May 2008. (*Code Civ. Proc.* § 338(d).)

Plaintiff's fraud-based causes of action are not stated with requisite particularity. When pleading fraud against corporate defendants, plaintiffs must specify the identity of the person who made the misrepresentation, his authority to speak on behalf of the corporation, and when and to whom the representation was made. (*Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) Plaintiff fails to specifically plead a complete causal relationship between the alleged misrepresentations and any harm claimed to have resulted therefrom. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092.) Nothing in the applicable California statutes precludes foreclosures by a party lacking possession of the original promissory note. (*Debrunner v. Deutsche Bank Nat'l Trust Co.* (2012) 204 Cal.App.4th 433, 440.)

Plaintiff's third cause of action for violation of Civil Code section 2923.6 fails to state facts sufficient to constitute a valid cause of action. This statute does not impose a duty on loan servicers to modify borrowers' loans, or create a private right of action for borrowers. The statute "merely expresses the *hope* that lenders will offer loan modifications on certain terms." (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 211 (*emph. in orig.*)) It does not require lenders to take action. (*Id.* at 223, *fn.* 8.)

Plaintiff's fifth cause of action for violation of Business and Professions Code sections 17200 *et seq.* fails to state facts sufficient to constitute a valid cause of action. Plaintiff lacks standing to bring this claim as he fails to allege that he has suffered injury in fact and lost money or property as a result of the alleged unfair practices. (*Bus. & Prof. Code* §§ 17204; 17535; *R&B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 360.) Further, plaintiff does not establish a specific law or laws that were violated, or that defendants committed fraud. (*Berryman v. Merit Prop. Mgmt., Inc.* (2007) 152 Cal.App.4th 1544, 1554.) A UCL claim stands or falls depending on the fate of the antecedent substantive causes of action. (*See Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178.)

Plaintiff's sixth cause of action to set aside a defective and wrongful foreclosure fails to state facts sufficient to constitute a valid cause of action. Plaintiff has no standing to challenge the foreclosure proceedings, as he has not alleged tender or the ability to tender. (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579; *Karlsen v. Am. Sav. & Loan Ass'n* (1971) 15 Cal.App.3d 112, 121.) Based on documents of which the court takes judicial notice, defendants were authorized to initiate foreclosure proceedings against plaintiff. Plaintiff also fails to allege any prejudice resulting from the alleged actions of defendants.

Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by

amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint does not suggest on its face that it is somehow capable of amendment and plaintiff has failed to make any showing that the complaint can be amended to change its legal effect. The demurrer is sustained without leave to amend.

14. S-CV-0030941 Raspberry, Iva Denise vs. D.R. Horton Inc.

Defendants' objections to evidence submitted in support of plaintiffs' opposition are sustained. Defendants' Motion to Stay Pursuant to Civil Code § 930 is granted. At least 30 of the 35 homes involved in this case were purchased after January 1, 2003. Accordingly, the provisions of Civil Code sections 895, *et seq.* ("SB800") apply to this case, at least as to those homes, as plaintiffs seek to recover damages from defendant based on construction defects for homes purchased after January 1, 2003. Plaintiffs do not contend that they complied with the pre-litigation requirements of SB800. Homeowners bear the burden of showing that they are released from such procedural requirements. (*Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 834-835.)

Defendants do not dispute that at least five of the homes at issue may not be subject to SB800, as being purchased prior to January 1, 2003. However, given that the case must be stayed as to the majority of the defendants, the court finds that it is in the interest of judicial economy to stay the action as to all plaintiffs at this time.

If oral argument is requested, plaintiffs' request for telephonic appearance is granted. An OSC re Status of Stay is set for January 31, 2013 at 11:30 a.m. in Department 40.

15. S-CV-0031113 Zygairewicz, Raya vs. Cernik, David G., D.D.S

The Demurrer to the Complaint is dropped. A first amended complaint was filed.

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